PREME COURT, U. S.

FILED
JUL 25 1968
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1968

No. 66

THOMAS A. ALVAREZ, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

BRIEF IN OPPOSITION

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OPINIONS BELOW, JURISDICTION, AND QUESTIONS PRESENTED

Respondent accepts petitioner's Citations to Opinions Below, Jurisdiction, and Questions Presented.

STATUTES AND RULES INVOLVED

Section 29-2215, R. R. S. Nebraska, 1943:

> "Every probation officer, when so directed by the court in which he is serving, shall inquire into the antecedents, character and circumstances of any person or persons accused within the jurisdiction of such court, and into the mitigating and aggravating circumstances of the offense of such person, and shall report thereon in writing to such court or judge. * * *."

Section 24-210, R. R. S. Nebraska, 1943:

> "The Judges of the Supreme Court shall during the month of January in each odd-numbered year

revise the general rules of said court and adopt such additional rules as may be deemed necessary or appropriate for the dispatch of business before said court, including rules for the advancement of pending cases."

Section 8a. 2. (3) Revised Rules of the Supreme Court of the State of Nebraska, 1967:

"Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

STATEMENT OF THE CASE

Respondent adds to the matters set forth in Petitioner's Statement of the Case, the fact that in Nebraska, and particularly in Lancaster County, the presentence investigation is a regular and customary procedure. Petitioner was represented by counsel at the time he pleaded guilty, who knew such an investigation and report was being conducted and prepared. Petitioner presented material favorable to himself to be included in the report. No motion was made prior to sentencing for the production or inspection of the report.

The rules of the Nebraska Supreme Court provide that consideration of a cause will be limited to errors assigned and discussed. Contrary to petitioner's allegation and his statement of the case (page 5), no assignment of error was made to the effect that Section 28-401, R. R. S. Neb. 1943 violated the Due Process Clause of the Fourteenth Amendment because it was vague and lacked "rational guidelines" for a decision. This issue was raised for the first time in petitioner's

Motion for Rehearing, after the decision of the Nebraska Supreme Court.

ARGUMENT

I.

The Use By A Trial Judge of A Presentence Report in Fixing the Sentence of One Convicted of A Felony Does Not Violate the Due Process Clause of the Fourteenth Amendment, Even Though It May Contain Information Which Would Not Be Admissible in A Trial on the Merits, and the Defendant Is Not Afforded An Opportunity to Cross-Examine Witnesses nor Present Rebuttal Evidence.

That petitioner was not surprised that a presentence report was being prepared is apparent. He even submitted material to be included in it. The use of a presentencing report, prepared as authorized by Section 29-2215, R. R. S. Neb. 1943, is standard procedure in Lancaster County, Nebraska. We do not have a copy of the record in this court, and the original is not available to us, but we believe that no request was made for an inspection of the report before sentencing, and that no objection was made when it was offered in evidence. No motion for leave to rebut any of the facts contained in the report was made before, at, or after sentencing.

Petitioner, on page 7 of his brief, states that he need not quarrel with the results in *Williams* v. *New York*, 337 U. S. 241, 93 L. Ed. 1337 (1949), to assert that the use of the presentence report denied him due process. If this is true, we must confess that petitioner can see a finer distinction than we can, because we are completely unable to distinguish *Williams* from

the case under consideration herein. This court, in *Williams*, said:

"* * * * *

"To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

"* * * * *"

Williams has been followed in numerous cases since 1949, including *Williams* v. *Oklahoma*, 358 U. S. 576, 3 L. Ed. 2d 516, 79 S. Ct. 421 (1959). As recently as 1967, in *Specht* v. *Patterson*, 386 U. S. 605, 18 L. Ed. 2d 326, 87 S. Ct. 1209, this court distinguished, but adhered to *Williams* v. *New York*.

Petitioner complains that the report contains matters which are prejudicial to him, and which he had no opportunity to rebut. Undoubtedly the same situation prevailed in *Williams* v. *New York*, and the entire thrust of *Williams* is that this fact did not constitute a violation of due process. Furthermore, at least as to some of the matters complained of, petitioner's version was included in the report. What weight, if any, was to be given to conflicting stories was a matter to be resolved by the judge.

There is, of course, no evidence whatever that the judge relied upon the matters petitioner complains of in fixing the sentence. The evidence of the crime itself, even assuming the accuracy of petitioner's account of it, is certainly enough to justify the court in imposing the death sentence. Petitioner, by his own account entered the home of the young mother of two children, raped her, robbed her, and deliberately murdered her by tying a cord around her neck. No other evidence should be necessary to convince a court that he was a depraved, vicious and extremely dangerous individual—even if his previous record had been spotless.

II.

Discretionary Authority in A Trial Judge to Set Sentences Within Minimum and Maximum Limits Does Not Violate the Due Process Clause of the Fourteenth Amendment Due to Vagueness.

Petitioner, in support of his second proposition of law, cites numerous cases, none of which seem to be in point. Not one suggests that a statute authorizing a judge, within prescribed limitations, to determine the sentence, without specifying the basis upon which he shall make the determination, is violative of due process. We suggest that no such decisions exist.

In the case of *Williams* v. *New York*, 337 U. S. 241, 93 L. Ed. 1337, previously cited herein, this court specifically recognized that wide discretion was vested in a sentencing judge as to the types and sources of information to be used in fixing sentences, and that this discretion is increasing, saying:

"* * * * *

"Modern changes in the treatment of offenders make it more necessary now than a century ago

> for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. * * *.
>
> "* * * * * *"

It is extremely doubtful that it would be possible to devise standards of sentencing that would be practical in view of the myriad considerations involved. No two individuals are alike, and an attempt to specify which particular factors of previous criminal records, intelligence, age, family background, heinousness of the crime, prospects of reformation, danger to the community, etc. should be given what weight in arriving at what sentence would be an exercise in futility.

Furthermore, we point out that the slightest exploration in that field by this court would open up Pandora's box, not to mention prison gates all over the country. We have no specific information about other states, but any intimation by this court that discretion in sentencing by a trial judge, in the absence of specific statutory guidelines, violated due process for vagueness would free all of the prisoners in Nebraska who are not serving the minimum sentences authorized by statute.

We further point out that Section 8a. 2. (3) of the Rules of the Nebraska Supreme Court, authorized by Section 24-210, R. R. S. Neb. 1943, provides:

> "Assignments of error relied upon for reversal and intended to be urged in the brief shall be sparately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

An examination of appellant's brief in the case of *State* v. *Alvarez* in the Supreme Court of Nebraska shows that none of the assignments of error listed on pages two and three of the brief makes the contention that Section 28-401 is violative of due process for vagueness. We therefore submit that petitioner had not raised the question in the manner required by Nebraska procedural rules.

III.

The Death Penalty Is Not A Cruel and Unusual Punishment, in Violation of the Eighth and Fourteenth Amendments.

Petitioner suggests that the death penalty is cruel because it is, these days, rarely inflicted. We are unable to follow this argument, unless it be on the theory that misery loves company, and that a convicted murderer suffers less awaiting execution if he knows many others will also be executed. This argument appears to be a non sequitur.

This court has, through the years, frequently upheld the death penalty, and has specifically held it not to be cruel and unusual punishment. In *Louisiana* v. *Resweber*, 329 U.S. 459, 91 L. Ed. 422, the court said:

> "* * * * *
>
> "* * *, The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. * * *.
>
> "* * * * * *"

Petitioner in the third and fourth sections of his argument, inveighs against the death penalty, as unnecessary, ineffective, and cruel. He says, "Life is a funda-

mental right," and "Existence is a prerequisite to the exercise of any rights." We suspect that Mary O'Shea would have agreed, and certainly her children and husband would agree. Petitioner deliberately, wantonly, brutally, senselessly deprived her of her life, with no excuse or provocation whatever. Nebraska has said that in that situation the murderer's life may be forfeited. The propriety of such a possible sentence is a decision for the Nebraska Legislature, and not for this court, or for any court.

No one could seriously contend that the framers of the Constitution intended to prohibit capital punishment. It was a common and accepted form of punishment at the time of the adoption of the Constitution and of the Fourteenth Amendment. Petitioner now asks this court, at this late date, to suddenly "discover" that the Fourteenth Amendment prohibits the death penalty. What he is asking for is judicial legislation of the most blatant sort. We believe the court in *Jackson* v. *Dickson*, 325 F. 2d 573, cert. den. 84 S. Ct. 1637, 377 U. S. 957, 12 L. Ed. 2d 501, expressed the proper approach to this matter, saying:

"* * * * *.

"Here there is no suggestion, as there was in certain of the cases above cited, that the method of administering the penalty is cruel or unusual. The contention is only that the penalty itself is of that character. This contention, in the light of the foregoing authorities, we must reject. *Jackson's arguments, which attack the penalty as incompatible with modern concepts of justice, would more properly be addressed to the California legislature. It is not for us to write our personal views on the matter, whatever they may be, into the Constitution.* * * *.

"* * * * *." (Emphasis supplied)

We submit that the question of the abolition of capital punishment is a legislative, not a judicial one, and the right to resolve that question, so far as it pertains to Nebraska convictions, is vested solely in the Nebraska Legislature. Petitioner is asking this court to usurp this legislative function because, he hopes, the majority of this court is opposed to the death penalty. We are confident that the court will refuse to do so.

CONCLUSION

We therefore submit that no substantial federal constitutional question is involved, and that certiorari should be denied.

Respectfully submitted,

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